

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OLAVONNE MORDHORST,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

Defendant.

Case No. C10-5736-RSL-BAT

**REPORT AND
RECOMMENDATION**

Olavonne Mordourst seeks review of the denial of her Supplemental Security Income and Disability Insurance Benefits applications. She argues the ALJ erred by (1) rejecting her testimony that she needs to use a cane and has hypersomnia and (2) incorrectly finding that jobs as a surveillance monitor exist in significant numbers in the national economy. *See* Opening Brief, Dkt. 15 at 5-7. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

Ms. Mordhorst is currently 46 years old, attended college for two years, and worked as an assistant restaurant manager, customer service clerk, and child care and home care provider. She applied for benefits in 2007 alleging disability beginning December 31, 2001. The ALJ found

her not disabled after conducting a hearing on July 28, 2009. As the Appeals Council denied Ms. Mordhorst's request for review, the ALJ's decision is the Commissioner's final decision.

ALJ'S DECISION

Utilizing the five-step disability evaluation process,¹ the ALJ made the following findings:

Step one: Ms. Mordhorst had not worked since December 31, 2001.

Step two: Ms. Mordhorst's asthma, sleep apnea, left shoulder tendinitis, lymphedema and obesity are severe impairments.

Step three: These impairments did not meet the requirements of a listed impairment.²

Residual Functional Capacity: Ms. Mordhorst can perform sedentary work. She can walk or stand, with normal breaks, at least two hours but no more than six hours in an eight hour workday. She can sit six hours with normal breaks. She cannot climb ladders or scaffolds and can occasionally climb ramps, stairs, kneel, stoop or crouch. She has limited use of her nondominant left hand due to shoulder impairment that occasionally flares when she reaches. She must avoid fumes, odors, dusts and avoid work in poorly ventilated areas due to asthma.

Step four: Ms. Mordhorst cannot perform her past work.

Step five: As there are jobs Ms. Mordhorst can perform she is not disabled.

Tr. 13-19.

DISCUSSION

A. Whether the ALJ properly considered Ms. Mordhorst's testimony

At the hearing before the ALJ, Ms. Mordhorst testified sleep apnea causes her to fall asleep for 20 to 30 minutes, three to four times a day³ and that she has a cane⁴ and sometimes uses a walker. Ms. Mordhorst argues the ALJ erred by failing to include these limitations in

¹ 20 C.F.R. §§ 404.1520, 416.920.

² 20 C.F.R. Part 404, Subpart P. Appendix 1.

³ Tr. 32-33.

⁴ Tr. 34.

1 assessing her residual functional capacity. Dkt. 15 at 5. The Commissioner contends the ALJ
2 properly discounted Ms. Mordhorst's testimony as inconsistent with other statements she has
3 made, and inconsistent with the medical evidence. Dkt. 16 at 6.

4 The ALJ did not find Ms. Mordhorst was malingering and thus was required to give clear
5 and convincing reasons to reject her testimony about the severity of her symptoms. *Smolen v.*
6 *Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). In this case, the ALJ properly discounted Ms.
7 Mordhorst's testimony about needing a cane but erred in rejecting her testimony about
8 hypersomnia.

9 The ALJ did not specifically articulate why he did not believe Ms. Mordhorst's testimony
10 about hypersomnia. It appears the ALJ believed the medical evidence did not support her
11 testimony. As the decision states:

12 The claimant also reported difficulty sleeping and indicated that
13 she was hypersomnolent during the day. Dr. Brown noted that the
14 claimant kept trying to fall asleep during the history. Dr. Brown
15 assessed severe asthma with allergic non-allergic components, and
16 sleep apnea by history but her hypersomnolent state would suggest
17 the likelihood of the same.

18 Tr. 14. This suggests the ALJ viewed Ms. Mordhorst's claims of hypersomnia as unsupported
19 by objective medical evidence, based solely on her statements, and thus not credible. The
20 medical record, however, does not support this view. The ALJ mentions Ms. Mordhorst
21 underwent an overnight polysomnogram which established she has "severe obstructive sleep
22 apnea." Tr. 14. But what the ALJ fails to mention is this same overnight study indicated "[t]his
23 patient has a profound problem with hypoxia, as well as obstructive sleep apnea. The obstructive
sleep apnea observed may result in daytime sleepiness." Tr. 300. Hence, there is medical
evidence that supports Ms. Mordhorst's testimony about daytime sleepiness.

1 The ALJ's error in rejecting Ms. Mordhorst's testimony for lack of medical evidence is
2 not harmless in light of the vocational expert's testimony that Ms. Mordhorst would not be able
3 to work as a surveillance monitor if she fell asleep several times a day. Tr. 45. At this point, the
4 Court cannot say whether hypersomnia renders Ms. Mordhorst disabled or not. While there is
5 some medical evidence to support Ms. Mordhorst's hypersomnia claims, it is not well
6 developed.⁵ Consequently, the case should be remanded for further proceedings, rather than for
7 an award of benefits.

8 Although the ALJ erred in rejecting Ms. Mordhorst's testimony about hypersomnia, he
9 properly rejected her claims about needing a cane or walker. First, Ms. Mordhorst's testimony
10 about needing a cane or walker is inconsistent with the statement she gave in her adult function
11 report that she did not use a cane or a walker. Tr. 131. Second, it is also inconsistent with her
12 testimony that five years after her alleged disability onset date, she worked part-time in adult
13 home care and in daycare—activities that do not square with the need to use a walker. Tr. 24.
14 And third, no doctor or lay witness indicated Ms. Mordhorst used or needed to use a cane or
15 walker.

16 The Court recognizes that as Ms. Mordhorst is 5' 3", weighs over 270 pounds and has
17 heart and pulmonary problems, it would be reasonable to believe she needs a cane or walker.
18 However, where, as here, the ALJ provides a rational interpretation of the evidence, this Court
19 must uphold it. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). Additionally, the ALJ
20 found Ms. Mordhorst could perform work as a surveillance monitor. The vocational expert

21 ⁵ The overnight study raising concerns about daytime sleepiness was conducted in 2006. The
22 study stated Ms. Mordhorst's sleep apnea "may" cause sleepiness, not that it does cause
23 sleepiness. Additionally, it is unclear whether Ms. Mordhorst's sleepiness is treatable, and has
improved or worsened since the study. Without further development, it cannot be determined
whether hypersomnia renders Ms. Mordhorst disabled.

1 testified this job involves sitting and watching a monitor. Tr. 42. Hence, even if Ms. Mordhorst
2 needs to use a cane, she would be able to perform this job and any error would be harmless.

3 **B. Whether the ALJ properly found there are jobs Ms. Mordhorst can perform**

4 Dr. Joseph Moisan, a rehabilitation counselor and case manager, and vocational
5 consultant, testified as a vocational expert. Tr. 39. He testified Ms. Mordhorst could work as a
6 surveillance systems monitor, a job that would require her to sit in front of a monitor in
7 department stores, casinos or companies that provide home security monitoring; he testified there
8 are 58,000 such jobs nationally and 2,730 in Washington State. Tr. 42. Taking into account Ms.
9 Mordhorst's need for a relatively clean work environment, Dr. Moisan estimated, based on his
10 personal experience visiting employers, that one-half of the jobs nationally would meet Ms.
11 Mordhorst's needs. *Id.* at 43.

12 Ms. Mordhorst argues because Dr. Moisan's opinion is based on his experience, he
13 provided insufficient "data regarding how many of these jobs at which Ms. Mordhorst would be
14 able to maintain employment due to environmental concerns, [and] it was error for the ALJ to
15 determine that Ms. Mordhorst was employable at this job." Dkt. 15 at 6. The Court rejects this
16 argument.

17 First, Dr. Moisan appears qualified to give expert testimony and Ms. Mordhorst does not
18 argue otherwise. As an expert, he may render opinions based on his experience. Indeed,
19 experience is one of the recognized grounds to qualify a witness as an expert. *See* Fed. R. Evid.
20 702. Hence, there is no reason to discount Dr. Moisan's opinion that, based on his experience
21 visiting employers, one-half of the surveillance jobs would meet Ms. Mordhorst's needs simply
22 because he was relying on his experience.

23 Second, Ms. Mordhorst argues Dr. Moisan's opinion is not "quantified by the Dictionary

1 of Occupational Titles.” Dkt. 15 at 6. This argument is made without discussion or supporting
2 authority and Ms. Mordhorst points to nothing in the DOT that undermines Dr. Mosion’s
3 opinion.

4 And third, Ms. Mordhorst’s argument implies there are not enough surveillance jobs that
5 meet her needs and thus she is disabled. Whether there are a significant number of jobs a
6 claimant is able to perform with her limitations is a question of fact to be determined by a
7 judicial officer. The existence of two “isolated jobs” is not adequate to support a finding that
8 there is a significant number of jobs the claimant is able to perform. *Walker v. Matthews*, 546
9 F.2d 814, 820 (9th Cir. 1976). However, Dr. Moison estimated 29,000 jobs nationally and 1,365
10 jobs in Washington State met Ms. Mordhorst’s limitations. Hence, this is not a case involving
11 “isolated jobs that exist only in very limited numbers in relatively few locations outside of the
12 region where you live.” 20 C.F.R. § 404.1566(b). The ALJ thus did not err in finding there exist
13 in significant numbers, surveillance systems monitor jobs that meet Ms. Mordhorst’s limitations.

14 CONCLUSION

15 For the foregoing reasons, the Court recommends that the Commissioner’s decision be
16 **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,
17 the ALJ should (1) further develop the medical evidence regarding Ms. Mordorst’s hypersomnia;
18 (2) reevaluate the medical opinions in the record regarding hypersomnia; (3) reevaluate Ms.
19 Mordhorst’s RFC as necessary; and (4) reassess, as necessary, steps four and five of the
20 sequential evaluation process with the assistance of a vocational expert if deemed appropriate. A

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1 proposed order accompanies this Report and Recommendation.

2 DATED this 6th day of May, 2011.

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6 BRIAN A. TSUCHIDA
7 United States Magistrate Judge
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